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Restoring Faith in the Attorney/Client Relationship: Alaska’s Mandatory Fee Arbitration

A. Fred Miller, Attorneys at Law, P.C. v. Purvis

I. INTRODUCTION

Arbitration is an effective method of alternative dispute resolution (ADR) in resolving a disagreement between an attorney and client over legal fees. The arbitration proceeding offers benefits for both lawyers and clients. Attorneys avoid having to sue a former client for a delinquent bill and face the very real possibility of a malpractice counterclaim. The client, on the other hand, avoids the aggravation of retaining another counsel to defend the suit. Mandatory fee arbitration, as established by the Alaska Supreme Court, places the decision to submit to arbitration squarely in the client’s hands. Once the client chooses arbitration, the attorney is obligated to proceed and the client gives up the right to sue in court. Arbitration is expedient, preserves client confidentiality, and offers an impartial forum including attorney as well as lay members. Attorneys have challenged the compulsory nature of mandatory fee arbitration on such constitutional grounds as denial of due process. This article argues that the advantages of mandatory fee arbitration significantly outweigh its disadvantages, and that it should be more widely adopted by state supreme courts or legislatures as one way in which to bolster public perception of the legal profession.

II. FACTS AND HOLDING

In A. Fred Miller, Attorneys At Law, P.C. v. Purvis, the law firm of A. Fred Miller (“Miller”) appealed from a judgment entered in the Superior Court of Ketchikan, Alaska.² The court had affirmed a decision of a mandatory arbitration panel and entered a judgment totaling $9887 in favor of Miller’s former client, Mary Jane Purvis (“Purvis”).³

Miller had represented Purvis in a divorce case and charged her $34,914.50 in legal fees.⁴ Purvis then invoked the mandatory fee arbitration provision of Alaska Bar Rules 34-42.⁵ In Alaska, a client involved in a fee dispute with an attorney has

2. Id. at 611.
3. Id. The arbitration panel required Miller to repay Purvis $8500. Purvis had paid Miller $17,017.01, while the panel held that a “reasonable fee” amounted to $8500.00 Additionally, the superior court awarded Purvis interest, costs, and attorney fees.
4. Id. Miller also charged Purvis $1017.61 for expenses, $4596.97 in interest, and $1624.97 in sales tax.
5. Id. In 1974, the Alaska Supreme Court established mandatory fee arbitration; it did so upon request of the Alaska Bar Association. Supreme Court Order #176 (February 26, 1974).
a right to resolve the dispute by submitting it to arbitration; however, attorneys do not have a reciprocal right.  

Either party may appeal the arbitration panel's decision to the superior court pursuant to the limited grounds authorized in the Alaska Uniform Arbitration Act. The Miller law firm contended that it was denied due process in that Alaska Bar Rule 40(u) affords only an attenuated appeal from an arbitration panel. Miller claimed that mandatory arbitration is constitutional only when there is judicial review on the merits. Therefore, to pass constitutional muster, an appellate court should review the arbitration panel's decision for "clearly erroneous findings of fact, and arbitrary and capricious applications of the law."  

The Alaska Supreme Court observed that "[b]oth attorney and client have an interest in fair, expedient, and inexpensive adjudication." The court noted that because review on the merits involved greater judicial involvement, the process would probably require additional counsel, tend to cause delay, and result in greater expense. The court examined the unique context of the attorney/client relationship, noting the inherent difficulties encountered in litigation over fees. After considering these factors and its duty to maintain public confidence in the legal system, the Alaska Supreme Court held that "the benefits to be gained from appellate review on the merits necessarily outweigh[ed] the detriments which such review would entail." Thus, the court affirmed the superior court and found no denial of Miller's right to due process.

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6. 921 P.2d at 612.
7. Id.
8. Id. See Alaska Uniform Arbitration Act. ALASKA STAT. § 09.43.120 (West 1997) concerns vacating an award:
   1) award procured by fraud or undue means;
   2) partiality or corruption by an arbitrator;
   3) arbitrators exceeded their powers;
   4) arbitrators refused to postpone the hearing upon sufficient cause or refused to hear material evidence;
   5) there was no arbitration agreement.

See also ALASKA STAT. § 09.43.130 (West 1997) allowing modification of award when:
   1) there was evident miscalculation of figures or mistake in description;
   2) the arbitrators have awarded on a matter not submitted;
   3) the award is imperfect in a matter of form not affecting the merits of the controversy.
9. 921 P.2d at 612.
10. Id. at 618.
11. Id.
12. Id.
13. Id.
14. Id.
III. LEGAL BACKGROUND

A. Origins of Mandatory Fee Arbitration

Increasing litigation between attorneys and clients became a public relations nightmare for the American Bar Association (ABA) by the 1960s. Numerous public opinion polls suggested that fee disputes were the most serious problem between the public and the legal community.

The impetus for mandatory fee arbitration emerged from the ABA’s Clark Committee in 1970. The committee called for mandatory arbitration, including lay-person involvement, organized outside of the auspices of the organized bar associations. In 1974, the ABA propounded a set of model by-laws to assist local and state bar associations in developing viable attorney-client fee arbitration programs. While the Clark Committee advocated use of lay arbitrators, the Special Committee did not. Furthermore, the Special Committee dispensed with mandatory fee arbitration and called for voluntary fee arbitration. The notion was that bar associations would not adopt fee arbitration if it mandated attorney participation.

In 1985, the ABA’s Commission on Professionalism promulgated a number of ideas designed to restore ethics in legal practice. For example, all fee arrangements should be in writing. This Commission called for expanded use of ADR, pointing out that a client involved in a fee dispute should have an absolute right to seek arbitration from an “impartial fee review committee” including lay members.

The Alaska Supreme Court followed the ABA’s recommendations, and by order, the court established a mandatory fee arbitration system in 1974. In disputes of more than $5,000, the Alaska Bar Counsel appoints not less than two attorney members and one public member. In disputes of less than $5,000, a single attorney

16. Id.
17. Id. at 1223.
18. Id. at 1224.
21. SPECIAL COMMITTEE ON RESOLUTION OF FEE DISPUTES OF ABA SECTION OF BAR ACTIVITIES, supra note 19, at 7.
22. Id.
24. Id. at 263.
25. Id.
26. 921 P.2d at 611. See Alaska Bar Rule 34(a) which mandates that arbitration is mandatory for an attorney when commenced by a client.
member sits as arbitrator.\textsuperscript{28} Arbitrators have authority to take and hear evidence, swear witnesses, use subpoena power to compel witnesses to appear or produce documents, and approve written requests for prehearing discovery.\textsuperscript{29} Both attorney and client are entitled to be represented by counsel (although purely optional), present and cross-examine witnesses, present documentary evidence, and challenge for cause any arbitrator assigned.\textsuperscript{30} The arbitration panel must issue its decision within 30 days of the close of the arbitration hearing\textsuperscript{31} and all records of the proceeding are confidential and not open to the public.\textsuperscript{32}

\section*{B. Constitutionality}

In 1981, the New Jersey Supreme Court in the case of \textit{In re LiVolsi}, rejected a constitutional challenge to its mandatory, client-invoked system of fee arbitration.\textsuperscript{33} Opponents argued four points on appeal: that the New Jersey Supreme Court lacked authority to implement mandatory fee arbitration; that attorneys were denied equal protection of the laws; that attorneys were denied a right to trial by jury under the New Jersey Constitution of 1947; and that the unappealability of an arbitral decision amounted to a due process violation of the Fourteenth Amendment and the New Jersey Constitution.\textsuperscript{34}

The New Jersey Constitution authorized the Supreme Court to exercise “plenary, exclusive, and almost unchallenged power over the practice of law” in its jurisdiction.\textsuperscript{35} The court was responsible for the proper functioning of New Jersey’s judicial system, which included regulatory power over the practice and procedures of law.\textsuperscript{36} A preeminent policy goal was to maintain public confidence in the legal system by ensuring fairness in the attorney/client relationship.\textsuperscript{37} Recognizing increasing complaints over fee disputes, the court asserted its right to review every aspect of legal fee arrangements.\textsuperscript{38}

The \textit{LiVolsi} court found no substance in the equal protection claim. Lawyers were not a protected “suspect class” and could allege no infringement of fundamental rights.\textsuperscript{39} The court argued that a “rational basis” existed which justified the need to ensure reasonable attorney fees and afford clients a swift, inexpensive remedy.\textsuperscript{40}

Regarding the claim of a right to trial by jury, the court held that prior to the New Jersey Constitution of 1947, lawyers never had an absolute right to a jury trial

\begin{itemize}
  \item \textsuperscript{28} Alaska Bar Rule 37(e).
  \item \textsuperscript{29} Alaska Bar Rule 37(i).
  \item \textsuperscript{30} Alaska Bar Rule 40(f).
  \item \textsuperscript{31} Alaska Bar Rule 40(q).
  \item \textsuperscript{32} Alaska Bar Rule 40(r).
  \item \textsuperscript{33} 428 A.2d 1268, 1270 (New Jersey 1981).
  \item \textsuperscript{34} Id.
  \item \textsuperscript{35} Id. at 1272.
  \item \textsuperscript{36} Id.
  \item \textsuperscript{37} Id.
  \item \textsuperscript{38} Id.
  \item \textsuperscript{39} Id. at 1273.
  \item \textsuperscript{40} Id.
\end{itemize}
in fee disputes. Courts of equity often intervened to enjoin an attorney action at law to collect a past due legal bill, explaining jurisdiction on the grounds that equity should protect client confidentiality and assure the fairness of legal fees. Furthermore, the New Jersey Supreme Court asserted that recognizing an attorney’s right to a jury trial would undermine the Court’s constitutional authority to regulate the Bar.

The court decided that there was no right to appeal from an arbitral committee’s decision under either the Fourteenth Amendment or the New Jersey Constitution. The federal due process clause does not require states to provide litigants with a right to appeal adverse lower court rulings.

In Anderson v. Elliott, the Maine Supreme Court also rejected a constitutional challenge to its mandatory fee arbitration system, basing its decision expressly on the inherent authority to regulate the legal profession and administer justice. A lawyer claimed that mandatory fee arbitration infringed on his right to a jury trial. The court found that mandatory fee arbitration encouraged efficient resolution of fee disputes between attorney and client.

The court remarked that non-participation in its voluntary arbitration program induced the establishment of a mandatory fee arbitration program. The court created an implied agreement binding on all attorneys in that state to submit to fee arbitration upon a client’s request, as a condition precedent to practice law in Maine.

The common denominator behind mandatory fee arbitration was to restore ethics in legal practice and encourage practitioners into a renewed commitment to professional responsibility. The Alaska Supreme Court reviewed this history when it considered a constitutional challenge to Alaska’s mandatory fee arbitration program in A. Fred Miller, Attorneys at Law, P.C. v. Purvis.

IV. INSTANT DECISION

On appeal, the defendant (Miller law firm) contended that mandatory arbitration is constitutional only when there is judicial review on the merits. The superior court should apply a “clearly erroneous” standard to issues of fact and an “arbitrary and capricious” standard to issues of law. Miller relied on a California case in which the court struck down on due process grounds (lack of judicial review)

41. Id.
42. Id. at 1274.
43. Id. at 1273.
44. Id. at 1275.
45. Id. at 1275-76.
46. 555 A.2d 1042, 1043 (Maine 1989).
47. Id.
48. Id. at 1044.
49. Id. at 1045.
50. Id.
52. Id.
53. Id.
a city ordinance which required binding arbitration for mobile home rent disputes.\textsuperscript{54} The Alaska Supreme Court found this authority unpersuasive, in that California statutes allowed for binding arbitration in heavily regulated industries, including the legal profession.\textsuperscript{55} Although most such schemes required judicial review on the merits, Miller's authority allowed that there were exceptions.\textsuperscript{56}

Plaintiff (Purvis) did not deny that compulsory arbitration should generally be accompanied by a right to appellate review on the merits.\textsuperscript{57} However, she argued that it was incumbent upon the Alaska Supreme Court to regulate the legal profession and that the very special nature of the attorney/client relationship justified an attenuated standard of review.\textsuperscript{58} Purvis relied primarily on \textit{In re LiVolsi} and \textit{Anderson v. Elliott}, and a majority of the Supreme Court of Alaska found they were in "substantial agreement" with these two decisions.\textsuperscript{59}

The court wrote that due process amounted to "an opportunity to be heard and the right to adequately represent one's interests."\textsuperscript{60} Alaska's fee arbitration system satisfied these criteria.\textsuperscript{61} The court further analyzed due process in terms of the flexible balancing test announced by the United States Supreme Court in \textit{Mathews v. Eldridge}.\textsuperscript{62} This test weighs (1) the private interest to be affected by state action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional safeguards; and (3) the government's interest, including fiscal and administrative burdens that additional procedural requirements would entail.\textsuperscript{63}

In applying the \textit{Mathews} test, the Alaska Supreme Court referred to the extra expense and delay to both parties to a fee dispute in allowing judicial review on the merits.\textsuperscript{64} The court discussed the significant governmental interest in ensuring confidence in the attorney/client relationship. Clients of limited means could little afford the costs of retaining another attorney to handle the appellate process.\textsuperscript{65} The court observed that over 400 cases had been disposed of by mandatory fee arbitration since 1974 and the process seemed to be working well.\textsuperscript{66}

\textsuperscript{54} \textit{ld.} at 613 (citing Bayscene Resident Negotiators v. Bayscene Mobilehome Park, 18 Cal. Rptr. 2d 626, 636 (1993)).
\textsuperscript{55} \textit{ld.}
\textsuperscript{56} \textit{ld.} at 613-614. The Alaska Supreme Court also rejected Miller's reliance on dicta in \textit{State v. Public Safety Employees Ass'n}, 798 P.2d 1281, 1287 (Alaska 1990), in which the Supreme Court suggested that in compulsory "interest" arbitration, a heightened standard of review might be required.
\textsuperscript{57} \textit{ld.} at 614.
\textsuperscript{58} 921 P.2d at 612.
\textsuperscript{59} \textit{ld.} at 617.
\textsuperscript{60} \textit{ld.} at 617-618 (citing Keyes v. Human Hospital, 750 P.2d 343, 353 (Alaska 1988)).
\textsuperscript{61} \textit{ld.} at 618.
\textsuperscript{62} \textit{ld.} at 618 (citing 424 U.S. 319, 335 (1976)).
\textsuperscript{63} \textit{ld.} at 618.
\textsuperscript{64} \textit{ld.}
\textsuperscript{65} \textit{ld.}
\textsuperscript{66} \textit{ld.} While the court does not offer an explanation of how it reached this conclusion, it can be inferred that they had first-hand knowledge of the program. See Alaska Bar Rule 36(e): the Alaska Bar Counsel must issue a quarterly report to the Alaska Supreme Court, with information about the number of fee arbitration petitions filed and concluded; the status of pending claims; the dispositions of concluded arbitrations; and the amounts involved. Party names are not provided.
In a lone dissent, Justice Rabinowitz agreed with Miller’s argument that mandatory fee arbitrations are constitutional only when there is judicial review on the merits. He argued that arbitral awards should be reviewable for “clearly erroneous findings of fact and arbitrary and capricious applications of the law.”67 Finally, he countered that the mere fact that fee arbitration has worked well does not translate into constitutionality.68

V. COMMENT

Writing in 1983, Professor James R. Devine approved of the widespread adoption of attorney/client fee arbitration programs.69 However, he commented that “volunteerism is not enough. What is needed is a compulsory fee resolution process.”70 Any arbitration program must recognize the right of an attorney to a fee, must have credibility with the public, and must maintain attorney/client confidentiality.71 Mandatory arbitration would assure attorney compliance, protect the right of both parties to a fair adjudication by including attorney and lay members, and preserve confidentiality.72

Not every legal scholar has been a supporter. But even those commentators who have criticized fee arbitration as detrimental to the best interest of the client, on closer examination, are not so at odds with a mandatory fee arbitration program such as that of Alaska.

Professor Lester Brickman recognized that a mandatory fee arbitration system could be a “cost-effective” remedy for an aggrieved client.73 However, his concern was that fee arbitration might function to deprive clients of protections afforded them by fiduciary and ethical rules.74 Arbitrators are not generally required to follow the substantive rules of law and their findings of both law and fact are not subject to appellate review.75 Brickman suggested that arbitrators of attorney/client fee disputes should be required to apply fiduciary and ethical rules in the cases before them.76 Appellate courts should then ensure that these standards have been applied; findings of fact and law would remain off-limits to review.77 Professor Brickman’s suggestions are reasonable and could be included under the limited standards already subject to review under the Alaska Bar Rules.

67. Id. at 619.
68. Id. Justice Rabinowitz referred to the case of DeLisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987). The Alaska Supreme Court rejected on constitutional grounds a requirement that attorneys represent indigent clients without compensation. He noted that this system had worked well for criminal defendants.
70. Id. at 1206.
71. Id.
72. Id. at 1259.
74. Id. at 280.
75. Id. at 281.
76. Id. at 306.
77. Id.
Professor Jean Fleming Powers recognized the advantage of ADR to both attorney and client in fee arbitration: savings of time and money; protection of client confidentiality; efficiency; and no need to retain another attorney.\(^78\) Her criticism focused more on the use of pre-dispute ADR agreements between attorney and client, particularly in the initial fee contract.\(^79\) The concern is that in an unequal bargaining context, a client might unknowingly waive her right to bring a legal malpractice action.\(^80\) Professor Powers suggested that a client be required to sign a separate document from the fee retainer, expressly noting that it covers all actions against attorneys, including malpractice, negligence, and breach of fiduciary duty.\(^81\) Professor Fleming’s fear was that fee arbitration may very well insulate an attorney from these sorts of legal claims.\(^82\) After a dispute arises between attorney and client, ADR can still be “a viable, favored form of dispute resolution, but the decision regarding its use [should] be put more squarely in the hands of clients.”\(^83\)

Professor Alan Scott Rau approved use of mandatory fee arbitration but cautioned that there were limits to its widespread adoption -- opposition from the Bar and attorney resistance.\(^84\) Rau supported mandatory fee arbitration as a way of including client participation in the process; encouraging the ultimate chances of payment of fees; and reducing the likelihood of the escalation of the conflict.\(^85\) It is this latter point that often leads to malpractice litigation. Professor Rau answered those scholars who are wary that a client might waive ethical and malpractice claims by submitting to arbitration.\(^86\) He noted that the rules of some fee arbitration programs provide that “at least where the client has already filed suit against the attorney seeking damages for malpractice, the arbitrators are to have no jurisdiction.”\(^87\)

Alaska Bar Rule 34(c)(2) provides that arbitration is not permissible when a client seeks affirmative relief against an attorney for damages based in malpractice or professional misconduct.\(^88\) In addition, when at the outset of a lawsuit against her client, the attorney has a duty to notify the client of the right to file a petition for fee arbitration; if the client so elects, this acts as a stay upon the legal proceedings.\(^89\) A client electing her right of arbitration must file a petition with the Alaska Bar Counsel.\(^90\) The form must be signed by the client and contain: a statement of the efforts made to resolve the matter; that the client understands the limited nature of

\(^{78}\) Jean Fleming Powers, Ethical Implications of Attorneys Requiring Clients to Submit Malpractice Claims to ADR, 38 S. TEX. L. REV. 625, 637 (1997).

\(^{79}\) Id. at 638.

\(^{80}\) Id.

\(^{81}\) Id. at 659-660.

\(^{82}\) Id. at 660.

\(^{83}\) Id. at 668.


\(^{85}\) Id. at 2073.

\(^{86}\) Id.

\(^{87}\) Id. at 2048.

\(^{88}\) Alaska Bar Rule 34(c)(2) (West 1997).

\(^{89}\) Id. at 39(a).

\(^{90}\) Id.
judicial review; that the determination may be reduced to a judgment; and a statement of the dollar amount in dispute. 91

Thus Alaska recognizes the distinction between a purely monetary dispute and an action in malpractice. Nevertheless, Professor Brickman’s suggestion is valuable, in that review for ethical or professional misconduct could be added to the limited review without upsetting the merits of ADR. This is certainly within the authority of the Alaska Supreme Court to supervise attorney/client relations. But even without this reform, Alaska’s procedure affords the client clear choices; the client can still opt to file a malpractice counterclaim against a lawsuit by her former attorney. If she opts for arbitration, the client must acknowledge that she understands the binding nature of the decision and that all claims are to be decided by the arbiter. The Alaska mandatory fee arbitration system, then, affords the client an opportunity to make an informed choice as to whether to choose ADR.

The ABA observed in 1974 that attorney unwillingness to participate in voluntary fee arbitration was the most significant impediment to wide adoption of ADR in attorney/client disputes. 92 In particular, the ABA noted the type of attorney who refused participation was one apt to have poor billing records and whose practice failed to exhibit a level of professional responsibility. 93 On the other hand, the conscientious attorney who has rendered a valuable service to his client has nothing to fear from arbitration. 94 Provided his fees are reasonable and billing records accurate, this attorney will be well-served by resolving the dispute promptly and avoiding protracted litigation. 95

While in its 1974 report the ABA did not think mandatory fee arbitration would be widely adopted, it recognized the ameliorating effect that such a system might promote in that “the more effective the method for resolving seemingly irreconcilable fee disputes, the less likely it is that parties will allow irreconcilable disputes to arise.” 96

VI. CONCLUSION

Mandatory fee arbitration, as adopted by the Alaska Supreme Court, appears to be a national trend. 97 Its most important benefit to lawyers is preventing fee disputes from escalating out of control. Suing former clients is only apt to engender bitterness and a plethora of malpractice counterclaims. The ethical, competent attorney has nothing to fear by submitting to a fee arbitration forum. Arbitration preserves client confidentiality and can be utilized more quickly than traditional

91. Id. at 40(a).
92. See supra note 19, at 1.
93. Id. at 2.
94. Id.
95. Id.
96. Id. at 6.
97. News for Sole Practitioners, 13 COMPLEAT. LAW. 8, 10 (Spring 1996): To date, nine states and Washington, D.C. require lawyers to participate in fee arbitration (Alaska, California, Maine, Minnesota, New Jersey, New York, North Carolina, South Carolina, and Wyoming) and five more states (Georgia, Montana, Nevada, Tennessee, and Washington) are considering doing the same.
litigation. And by offering clients access to an impartial tribunal, mandatory fee arbitration is an important step toward renewing the public’s faith in the judicial system.

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